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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The question presented is whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes persecution "on account of" that person's political opinion.

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case.

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The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 5a-25a, is reported at 921 F.2d 844. The initial opinion of the court of appeals is reported at 908 F.2d 1452. The opinion of the Board of Immigration Appeals denying respondent's motion to reopen his deportation proceeding, App., *infra*, 27a-33a, is unreported. The opinion of the Board of Immigration Appeals denying respondent's motion for reconsideration of its dismissal of respondent's appeal, App., *infra*, 34a-36a, is unreported. The opinion of the Board of Immigration Appeals dismissing respond-

ent's appeal, App., *infra*, 37a-38a, is unreported. The oral opinion of the Immigration Judge, App., *infra*, 39a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on January 10, 1991. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Refugee Act of 1980, added to the Immigration and Nationality Act of 1952 as Sections 101(a)(42) and 208(a) and codified at 8 U.S.C. 1101(a)(42) and 1158(a), are reproduced at App., *infra*, 43a-44a.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, limits eligibility for asylum to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). A "refugee" is defined to be any person who is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

Respondent Jairo Jonathan Elias Zacarias left his native Guatemala after two masked guerrillas armed with machine guns asked him to join their army and, when he declined to join, told him to "think it [over] well." App., *infra*, 6a-7a. In his deportation proceeding, respondent applied for asylum and withholding of deportation on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion.

The Immigration Judge and the Board of Immigration Appeals denied the requested relief because the guerrillas did not threaten to harm respondent if he refused to join them, and because any implicit threat was not "on account of" his political opinion.

The Ninth Circuit reversed and found respondent eligible for asylum. It held that the Guatemalan guerrillas' practice of forcible recruitment made it reasonable for respondent to take the admonition to "think it [over] well" as a threat. App., *infra*, 17a. Moreover, that threat was "properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Id* at 12a. On the basis of its conclusion that respondent was a "refugee" within the meaning of the 1980 Act, the court of appeals remanded for the BIA to determine whether respondent should be granted asylum. *Id.* at 25a.

1. Respondent is a nineteen-year-old man who left his native Guatemala in March 1987, a few months after two masked guerrillas came to his home. The guerrillas were armed with machine guns and asked respondent to join their army. Respondent refused to join, even though the guerrillas offered to pay him to fight for them. The guerrillas told respondent to "think it [over] well" and said that they would be back. Respondent remained at home and continued to work at his regular job for the next two months before he decided to leave Guatemala for the United States. App., *infra*, 6a-7a, 32a, 40a-41a; C.R. at 37.

2. Respondent was apprehended for entering the United States without inspection. In his deportation hearing, respondent conceded his deportability and requested asylum and withholding of deportation. App., *infra*, 40a.

The Immigration Judge denied the requested relief. "Considering all the evidence," the Immigration Judge determined that "it does not appear that the respondent has established that he is a refugee within the meaning of 101(a)(42) of The Act" because he has "failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." App., *infra*, 41a-42a.

3. The Board of Immigration Appeals (BIA) summarily dismissed respondent's appeal when his counsel failed to file a brief or statement on his behalf. App., *infra*, 38a. Respondent then moved the BIA to reconsider its dismissal. The BIA denied the motion for reconsideration; treating the motion as one to reopen respondent's deportation proceeding, it denied the motion because "there has been no evidentiary showing by the respondent that would warrant the relief originally requested, or that the decision of the immigration judge would be reversed." *Id.* at 36a.

Respondent then moved the BIA to reopen his deportation proceeding and to consider new evidence in support of his appeal. The new evidence was a letter from respondent's father saying that the guerrillas visited the family's home twice since respondent left Guatemala: once in January 1988, and again in April 1988. In the January visit, the guerrillas asked for respondent's father and mother and left when they found that the father was not at

home. In the April visit, the guerrillas asked for the respondent, but were told that he was in the United States. Both visits were for the purpose of attempting to recruit respondent. App., *infra*, 31a.

The BIA determined that the letter from respondent's father "not only has failed to sustain his burden for reopening, * * * but also has failed to produce evidence that would establish a well-founded fear of persecution under the Act." App., *infra*, 31a. "Even though the respondent alleges that he was threatened by the guerrillas, the evidence of record does not bear this out"; "there was no threat made to the respondent that he would be harmed if he refused to join them." *Id.* at 32a. Even if the guerrillas threatened respondent, the BIA held, it was for the purpose of satisfying their need for soldiers and not "on account of" any political opinion held by respondent:

> [I]n our decisions in *Matter of Vigil*, Interim Decision 3050 (BIA 1988), and *Matter of Maldonado*, Interim Decision 3041 (BIA 1988), we opined that when a guerrilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services. In respondent's brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in their attempt to violently overthrow the Guatemalan Government. It can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive.

Id. at 32a-33a. The BIA concluded that respondent "failed to show, by his new evidence, a *prima facie* eligibility for asylum or that the results of respondent's deportation hearing would be changed." *Id.* at 33a. Accordingly, it denied the motion to reopen. *Ibid.*

4. The Ninth Circuit reversed. App., *infra*, 5a-25a. It found respondent eligible for asylum, based on the evidence presented to the immigration judge, on the ground that the guerrillas' attempt to recruit him constituted persecution "on account of" his political opinion. *Id.* at 6a. At the same time, the court held that the letter from respondent's father did not require the BIA to reopen the deportation proceeding with respect to his withholding of deportation claim. *Ibid.*[1]

At the suggestion of petitioner's counsel, the court of appeals treated the BIA's final ruling as both an affirmance of the Immigration Judge's denial of relief and as a denial of respondent's motion to reopen his deportation proceeding. App., *infra*, 6a & n.2. The court first reviewed the BIA's affirmance of the decision of the Immigration Judge. The court noted that the record before the Immigration Judge included an advisory opinion from the State Department on the merits of respondent's application for relief. *Id.* at 7a. Although the letter advised that respondent was *not* a refugee, *id.* at 7a, the court read it to support respondent's claim that "the guerrillas engage in forced recruitment." *Id.* at 8a. "Because nongov-

[1] An alien found eligible for withholding of deportation is entitled, without more, to that relief. An alien found eligible for asylum may still be denied that status in the discretion of the Attorney General. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987); *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

ernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution." *Id.* at 12a. "The persecution is properly categorized as 'on account of political opinion,'" according to the court, "because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." *Ibid.* (citing, *inter alia*, *Maldonado-Cruz* v. *INS*, 883 F.2d 788, 791 (9th Cir. 1989)).

Turning to the facts of the case before it, the court of appeals found that respondent was eligible for asylum but not for withholding of deportation. App., *infra*, 16a. "[I]n light of the guerrillas' practice of using force to recruit people, it certainly was reasonable for a person in [respondent's] situation to take the statements [to 'think it [over] well'] as threats." *Id.* at 17a. "Finally, the threat to [respondent] was for political as opposed to personal reasons; the Board did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with [respondent], and in any event, there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group*'s political goals. There was thus a reasonable possibility, based on the evidence presented [to the Immigration Judge], that the guerrillas would return and take [respondent] by force, thereby persecuting him on account of political opinion." *Id.* at 18a.

The court noted that respondent's evidence "failed to prove the 'clear probability' of persecution necessary to obtain withholding of deportation." App., *infra*, 18a. It further observed that the letter from petitioner's father "did not cure the key deficiency

in his withholding of deportation claim"—*i.e.*, the lack of specific evidence demonstrating that "forced recruitment was more than a reasonable possibility." *Id.* at 25a. Accordingly, the court upheld the BIA's denial of respondent's application for withholding of deportation, but remanded the case so that the BIA could exercise its discretion whether to grant respondent's asylum application. *Ibid.*[2]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit in this case held that forced recruitment by guerrillas is "persecution on account of * * * political opinion," and that recruits are eligible for asylum on that basis. 8 U.S.C. 1101(a)(42)(A). This holding—which the court applied in the absence of any evidence that the recruitment was intended to inflict harm on the recruit for his political opinions, rather than simply to enlist soldiers—conflicts with the decision of the Eleventh Circuit in *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292 (1990) (per curiam).

The Ninth Circuit's holding disregards the Refugee Act's requirement that persecution be "on account of * * * political opinion." 8 U.S.C. 1101(a)(42)(A). The quoted phrase requires proof, direct or circumstantial, that the persecutor's act is motivated by the desire to inflict harm on the victim "on account of" a "political opinion" to which the persecutor objects. The statutory eligibility requirement is not satisfied by the observation that the alleged persecutor is politically motivated. The fact that the

[2] Before denying a petition for rehearing, App., *infra*, 26a, the panel issued an order amending its opinion, *id.* at 2a-5a. The opinion reprinted in the Appendix, *id.* at 5a-25a, incorporates these amendments.

guerrillas intended to conscript respondent in order to further their political goal of overthrowing the government of Guatemala, see App., *infra*, 12a, 18a, does not qualify as "persecution on account of * * * political opinion."

By expanding that phrase to encompass forced conscription by political factions, the Ninth Circuit has opened eligibility for asylum to every candidate for military service in countries torn by domestic strife. Needless to say, the class of such persons is large. The looming burden for the INS in processing applications from such individuals, and for the Nation in assimilating them into society, necessitates this Court's review.[3]

1. The Ninth Circuit's decision in this case conflicts with the decision of the Eleventh Circuit in

[3] In another pending case, *Immigration and Naturalization Service* v. *Canas-Segovia*, No. 90-1246 (filed Feb. 6, 1991), we have petitioned for certiorari from a decision of the Ninth Circuit holding that a conscientious objector who fears punishment by the government of El Salvador for resisting universal military service is eligible for both asylum and withholding of deportation. Like this case, *Canas-Segovia* raises an important question of the meaning of "on account of" in the Refugee Act. But the issues are in substantial respects sufficiently different—here, the significance of the political objectives of a guerrilla group and in *Canas-Segovia* the significance of the conscript's conscientious objection to government-required military service—that we believe both decisions warrant plenary review. Moreover, a decision in either case would not necessarily govern disposition of the other case. For example, an opinion in *Canas-Segovia* holding that the "on account of" language requires proof of the persecutor's intent may not be determinative on the question whether an intent to pursue a political objective, which the Ninth Circuit found in the decision below, constitutes an intent to persecute on account of a "political opinion" within the meaning of the Refugee Act.

Perlera-Escobar v. *Executive Office for Immigration*, 894 F.2d 1292 (1990). Escobar was a deserter from a guerrilla force who feared punishment for his defection. *Id.* at 1294. Initially, Escobar had sought the guerrillas' protection from a Salvadoran "death squad." *Ibid.* According to Escobar, the guerrillas took him to their camp "where, against his will, he was trained and 'incorporated' into the guerrilla group." *Ibid.* During his nine months with the guerrillas, Escobar witnessed the execution of two guerrillas suspected of attempting to escape. *Ibid.* Nevertheless, Escobar deserted because he was "politically neutral" and did not want to fight against his fellow countrymen. *Id.* at 1294 & n.1. Two months after his escape, two guerrillas told Escobar that "the guerrilla commander had issued orders for his arrest." *Id.* at 1294. The guerrillas were still looking for Escobar after he had entered the United States. *Ibid.* At his deportation hearing, Escobar testified that "he would be killed by the military upon arrival in San Salvador because the army knew he was a guerrilla, and that he would be killed by the guerrillas because of his desertion." *Ibid.*

The Board of Immigration Appeals concluded that Escobar was not eligible for asylum because the punishment Escobar feared was not "persecution on account of political opinion"; "there was no evidence that the guerrillas' motivations to harm him are other than the need to discipline and deter desertion by its members." 894 F.2d at 1295.

The Eleventh Circuit agreed that the guerrillas' efforts to field and retain combat troops did not constitute "persecution on account of * * * political opinion" and affirmed the BIA's denial of relief to Escobar. 894 F.2d at 1296-1299. The court noted at the outset its "oblig[ation]" to defer to the BIA's

"construction of the phrase 'on account of . . . political opinion' * * * if that interpretation is reasonable." *Id.* at 1296. The court observed that "[t]he meaning and scope of the phrase 'on account of . . . political opinion' is not defined by the Act, nor does it appear from the legislative history that Congress unambiguously expressed an intent that the term should be construed in a particular way." *Ibid.* Since the Refugee Act did not define the statutory phrase, the court concluded that it must give "considerable weight" to the BIA's interpretation and may not substitute its own construction for the reasonable interpretation of the BIA. *Ibid.* (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), and *INS* v. *Cardoza-Fonseca*, 480 U.S. at 448).

The Eleventh Circuit found reasonable "[t]he BIA's determination that the need to discipline and silence deserters is not persecution on account of 'political opinion' within the meaning of the Act." 894 F.2d at 1298. The court reasoned that "[a] finding of persecution requires some degree of intent on the part of the alleged persecutor to harm the applicant in order to overcome a belief of the applicant." *Ibid.* No such intent was established by Escobar:

> In the absence of any evidence that the guerrillas are interested in him for political reasons, the BIA inferred from the record that Escobar is nothing more than a deserter. The record makes it apparent that the guerrillas are a paramilitary organization exercising control and discipline over its members. *It is also apparent that the guerrillas often rely on coercion to recruit soldiers who would not otherwise join them.* From these facts the BIA inferred that in order to maintain order and promote loyalty from its

> members, the guerrillas must discipline deserters. Without such measures the guerrillas would perish when, as is inevitably the case, the spirit of its fighters wanes. In this respect the guerrillas are similar to any military organization that punishes deserters in order to maintain unity. Moreover, the guerrillas also have an interest in preventing Escobar from divulging their secrets to the government or government-backed groups. Even Escobar admits that the guerrillas are interested in him because of what he knows. *Simply, the guerrillas care not what Escobar thinks or believes; rather their interest in him stems from their need to preserve unity and order in their ranks and to ensure the secrecy of their operations.*

Ibid. (emphasis added). The Eleventh Circuit rejected the contention—accepted by the Ninth Circuit in this case—that because the guerrillas have political objectives, the statutory requirement that persecution be "on account of * * * political opinion," *id.* at 1299, is satisfied; to accept that argument, the Eleventh Circuit pointed out, "would entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum." *Id.* at 1299 n.5.[4]

The reasoning of the Ninth and Eleventh Circuits is diametrically opposed. The Ninth Circuit held that "[t]he persecution is properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." App., *infra*, 12a (citing, *inter alia*, *Maldonado-Cruz* v. *INS*, 883 F.2d 788, 791 (9th Cir. 1989)). The Eleventh Circuit flatly rejected that analysis when it held that "the fact that * * * the guerrillas are fighting to achieve political objectives does not imbue every act committed by them with political significance. Escobar may well fear persecution on account of what he believes to be political opinion. However, in the context of civil war where fear permeates the life of every citizen, the motivation of the persecution becomes the linchpin of the analysis." 894 F.2d at 1299.[5]

The fact that respondent was threatened with forcible recruitment, while Escobar was threatened with punishment for desertion, does not distinguish the two cases.[6] Both men faced threats of harm for fail-

[4] The Eleventh Circuit noted that its holding—that the guerrilla group's pursuit of Escobar for desertion was not "persecution on account of * * * political opinion"—did not disqualify all former guerrillas from eligibility for asylum. 894 F.2d at 1299. The applicant for asylum need only "demonstrate through evidence in the record, that the guerrillas pursue him to overcome a recognized political opinion." *Ibid.*

[5] The conflict between the Ninth and Eleventh Circuits is reflected in their use of authority. The Eleventh Circuit, 894 F.2d at 1297, spoke approvingly of the BIA's decisions in *In re Maldonado-Cruz*, Interim Dec. 3041 (1988), rev'd, 883 F.2d 788 (9th Cir. 1989), and *In re Vigil*, Interim Dec. 3050 (1988), and the BIA relied on those decisions in this case, App., *infra*, 32a. The Ninth Circuit reversed the BIA in this case, and relied on its opinion reversing the BIA in *Maldonado-Cruz*, App., *infra*, 12a. The Eleventh Circuit said that the BIA's opinion in *Maldonado-Cruz*—and not the Ninth Circuit's—is still "persuasive" in the Eleventh Circuit. 894 F.2d at 1297 n.4.

[6] Although the Eleventh Circuit mentioned that "Escobar was not forcibly recruited," 894 F.2d at 1297 n.4, it spoke approvingly of the BIA's decision in *In re Vigil*, Interim Dec. 3050 (1988), which held that "forced recruitment by either the guerrillas or the government does not constitute fear of persecution 'on account of political opinion.' " 894 F.2d 1297.

ing to comply with a guerrilla group's demand to serve in its armed forces. Both threats were motivated by the guerrillas' desire to field a military force to achieve the group's political objectives, not by a desire to harm the aliens "on account of" any "political opinion." If the threat to respondent was "on account of * * * political opinion," so too was the threat to Escobar.[7] Indeed, the death threat to Escobar was far more grave, and more credible (in light of the two executions Escobar witnessed and the guerrilla leader's order to arrest him), than the threat that prompted respondent to flee Guatemala.

2. The Ninth Circuit's expansion of asylum eligibility—from aliens facing "persecution on account of * * * political opinion" to aliens facing a threat of harm motivated by political *objectives*—overrides the statutory limit on refugee status and trenches on the deference owed to the BIA's reasonable interpretation of the Refugee Act.

a. A "well-founded fear of persecution on account of * * * political opinion," 8 U.S.C. 1101(a)(42)(A), plainly requires an intent to discriminate against a

[7] The Ninth Circuit's determination that respondent is eligible for asylum also conflicts in principle with decisions of the First Circuit requiring proof that persecution is intended to punish a political opinion. See *Umanzor-Alvarado* v. *INS*, 896 F.2d 14, 15 (1990) ("Insofar as this evidence shows that the Government [of El Salvador] may punish [the applicant] simply because he will not serve in the Army, however, it does not show that the Government will *persecute* him because of his *political opinion*."); see also *Alvarez-Flores* v. *INS*, 909 F.2d 1, 6 n.4 (1st Cir. 1990) ("Apparently only the Ninth Circuit has determined that mere refusal to join the guerrillas is itself a manifestation of neutrality within the meaning of the [Refugee] Act.").

person because of his political beliefs.[8] A guerrilla group's impressment of soldiers is not necessarily motivated by that intention. It is true that forcible conscription by a guerrilla group has a political goal. It is also true that a person confronted with a credible threat of forcible conscription may have a well-founded fear of physical injury or worse if he does not go voluntarily. But those two facts, which, at best, are all the respondent established in this case, do not satisfy the statutory requirement that limits eligibility for asylum to persons with a "well-founded fear of persecution on account of * * * political opinion." 8 U.S.C. 1101(a)(42)(A).

The Ninth Circuit reasoned that "[t]he persecution is properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." App., *infra*, 12a. Because "there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [respondent] to further the *group*'s political goals," respondent would be persecuted "on account of political opinion." *Id.* at 18a.

If the Ninth Circuit means that a threat made to achieve a political *objective* is equivalent to persecution on account of political *opinion*, that is simply not true. A person might be entirely sympathetic to the goals of the guerrillas, and share every one of their political beliefs, but not want to serve in their

[8] See Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 700 (1989) (Refugee Act requires that "the persecutor seeks to punish [the alien] for holding a specific political belief").

army. That person is faced with the same threat of forcible conscription as one who is entirely hostile to the guerrillas' program. Conversely, a person might share none of the guerrillas' views but be happy to sign for a decent wage. It should be obvious that neither of those persons has any fear of "persecution on account of * * * political opinion."

If the Ninth Circuit is suggesting that a threat must be presumed to be on account of political opinion unless the INS presents evidence to the contrary, such a presumption (or inference[9]) likewise has no basis in fact and is contrary to the Refugee Act. Section 208(a) of the Act vests in the Attorney General the authority to establish an asylum procedure, 8 U.S.C. 1158(a), and the procedure he has established requires the alien to bear the burden of proving his eligibility for relief, 8 C.F.R. 208.13. Since a guerrilla group may well seek to recruit young men in order to field a fighting force, not to persecute those men for their political opinions, the Attorney General's refusal to recognize such a presumption is plainly appropriate.[10]

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[9] In response to the government's petition for rehearing, which questioned the panel's use of a presumption, Gov't Reh'g Pet. 7, the panel deleted the word "presumption" and substituted the word "inference." See App., *infra*, 5a. Compare 908 F.2d at 1458 with App., *infra*, 18a.

[10] Another panel of the Ninth Circuit has read the decision below as "recogniz[ing]" that an alien may establish persecution from a non-governmental guerrilla group " 'on account of' political opinion without any expression of political belief greater than a mere refusal to join the group." *Alonzo* v. *INS*, 915 F.2d 546, 549 (1990). The panel described the decision here as one of a series in which the Ninth Circuit has "regularly presumed that an alien's refusal to join a guerilla group, without more, constitutes an expression of political neutrality sufficient to alert the guerillas of the alien's political beliefs." *Ibid.* The panel criticized this rule because it "ignores the possible existence of other reasons for refusing to join a guerilla group which are not on 'account of' political or religious reasons," including "cowardice, or a desire to invest in his business." *Ibid.* For this reason, the panel refused to extend it to cases of government conscription, but it could not reject it for cases of conscription by non-governmental groups. *Ibid.*

b. The flaw in the Ninth Circuit's opinion in this case is not simply a matter of words; it goes to the heart of the purpose of the Refugee Act. It was the goal of that statute to extend eligibility for asylum not to all victims of coercion, or even terror, but only to those who were threatened with persecution for certain reasons. Refusal to serve in someone's army is not one of those reasons.

The international agreements from which Congress drew the definition of "refugee" in the 1980 Refugee Act support the reading of "on account of * * * political opinion" as a limitation on asylum eligibility to those who are harmed or threatened with harm for their political beliefs. The definition of "refugee" in the 1980 Refugee Act originated in the 1946 Constitution of the International Refugee Organization (IRO). See *INS* v. *Cardoza-Fonseca*, 480 U.S. at 437. Responding to persecution perpetrated by the fascist powers before and during World War II, the IRO defined as "refugees" those persons who were outside their native country and were "victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war"; "Spanish Republicans and other victims of the Falangist regime in Spain"; and "persons who were considered refugees before the second world war, for reasons of race, religion, nationality or political opinion."

IRO Const., Annex 1, Pt. 1, § A1(a)-(c), 62 Stat. 3049. The IRO also defined as refugees "persons of Jewish origin or foreigners or stateless persons" who were returned to their native country by "enemy action" and became "victims of nazi persecution." IRO Const., Annex 1, Pt. 1, § A3, 62 Stat. 3049-3050. The IRO allowed refugees to decline to be repatriated to their native country if, among other reasons, they claimed "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions." IRO Const., Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3050.

The IRO definition of refugee was incorporated in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 152, whose definition of "refugee" was in turned revised in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, 19 U.S.T. 6225, T.I.A.S. No. 6577, to apply to persons who became refugees after January 1, 1951. The United States acceded to the Protocol in 1968. 19 U.S.T. 6257. In 1980, Congress, in enacting the Refugee Act, conformed the definition of "refugee" in United States immigration law to that in the 1967 Protocol. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. at 436, 437; S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980).

The 1946 Constitution of the IRO, the 1951 United Nations Convention, and the 1967 United Nations Protocol all require that persecution be "for reasons of," "based on," or "because of" the victim's race, beliefs, or nationality. The drafters of these instruments had in mind the many victims of fascist racial and ideological persecution. Refugees, as defined by

the examples in these instruments, were not just the unwilling conscripts of the respective national combatants, or the victims of war's dislocation; they were instead those who were made to suffer for their race, their beliefs, or their nationality.

c. Even if it were fair ground for debate whether harm inflicted or threatened in order to achieve a political objective qualifies as "persecution on account of * * * political opinion"—and we think it is not—the Ninth Circuit should have limited its consideration to the question whether the BIA's interpretation of that phrase was based on a permissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-843. As the Eleventh Circuit explained in *Perlera-Escobar*, "[t]he meaning and scope of the phrase 'on account of . . . political opinion' is not defined by the Act, nor does it appear from the legislative history that Congress unambiguously expressed an intent that the term should be construed in a particular way." 894 F.2d at 1296. In that situation, the Ninth Circuit plainly erred in giving no weight to the BIA's determination—developed in several cases, see *id.* at 1297; App., *infra*, 32a-33a—that forcible conscription by a guerrilla group is not necessarily "persecution on account of * * * [the conscript's] political opinion." See 894 F.2d at 1296.[11] By itself filling any gap left by Congress in the Refugee Act, the Ninth Circuit arrogated to itself the authority to make immigration policy and usurped

[11] Judge Sneed, in describing the Ninth Circuit's "departure from the general rule of deference to administrative decisions," *Mendoza Perez* v. *INS*, 902 F.2d 760, 766 (1990) (concurring specially), quoted *Perlera-Escobar* at length and concluded: "We of the Ninth Circuit do not speak in those tones," 902 F.2d at 767.

the role of the agency to which Congress delegated that responsibility. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2676-2681 (1990); *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *INS* v. *Cardoza-Fonseca*, 480 U.S. at 448; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844.

3. The Ninth Circuit's holding would, in the words of the Eleventh Circuit in *Perlera-Escobar*, "entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum." 894 F.2d at 1299 n.5. Given the number of draft-age males in countries like Guatemala, and the "incentives for draft-age males to raise asylum claims," *M.A. A26851062* v. *INS*, 899 F.2d 304, 315 (4th Cir. 1990) (en banc), it is not unreasonable to expect a flood of such claims from those placed in deportation proceedings in the Ninth Circuit.[12]

4. The importance of this case has not been diminished by passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Section 302 of that Act, 104 Stat. 5030, authorizes the Attorney General to extend "temporary protected status" to aliens who are nationals of a country that he finds,

[12] The number of aliens in a position to claim such relief is undoubtedly large. Over 60,000 aliens applied for asylum in 1988, more than twice as many as applied in 1987. *1988 Y.B. INS* xxviii (Aug. 1989). The number of asylum applications from Guatemala alone increased more than ten-fold in one year. *Ibid.* Approximately 56% of asylum applications are filed in the Immigration and Naturalization Service's Western Region, which lies within the jurisdiction of the Ninth Circuit. See *id.* at 58.

inter alia, to be in a state of "ongoing armed conflict" such that deportation to that country would pose a "serious threat" to the personal safety of the affected aliens. Section 302(b)(1)(A), 104 Stat. 5031 (to be codified at 8 U.S.C. 1254(a). But that status depends on particular country designations that have not been made, see *INS* v. *Cardoza-Fonseca*, 480 U.S. at 426 n.3 (asylum application not rendered moot by immigration law that was "not self-executing" and the procedures for which were "not yet in place"); the protected status is, as its name implies, "temporary," see Section 302(b)(2)(B), 104 Stat. 5032 (initial period of designation is "not less than 6 months and not more than 18 months"); cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 100-101 (1983) (administrative moratorium on police choke-hold for indefinite period did not moot challenge to practice); and temporary protected status is not the equivalent of asylum, since the Attorney General may adjust the status of an alien granted asylum to that of lawful permanent resident after one year; see 8 U.S.C. 1159; *INS* v. *Cardoza-Fonseca*, 480 U.S. at 427 n.3.

The "temporary protected status" authorized by the 1990 Immigration Act bears on the interpretation of the 1980 Refugee Act in one respect only. By authorizing the temporary withholding of deportation that "would pose a serious threat to [the alien's] personal safety," Section 302(b)(1)(A), 104 Stat. 5031, the 1990 Act seeks an objective far broader than that of the Refugee Act: it seeks to provide a sanctuary—albeit a temporary one—from the dangers of living in a country divided by civil war.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7507

INS No. A27-926-183

JAIRO JONATHAN ELIAS ZACARIAS, PETITIONER

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

ORDER AND AMENDED OPINION

Petition for Review of Three Orders
By the Board of Immigration Appeals

Argued and Submitted
March 13, 1990—Pasadena, California

Filed July 23, 1990
Amended December 19, 1990

Before: Betty B. Fletcher, Harry Pregerson and
Dorothy W. Nelson, Circuit Judges

Opinion by Judge Fletcher

ORDER

The opinion is amended by: (1) Inserting after the last paragraph on page 7725 of the Slip opinion, the following language:

The "reasonable possibility" standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) ("Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution."). In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), the Supreme Court noted that the "reasonable possibility" standard was a "moderate interpretation" of Section 208(a)'s well-founded fear requirement. Subsequent Ninth Circuit case law has consistently expressed the risk of persecution that must be demonstrated in order to fulfill the objective requirement of well-founded fear as a "reasonable possibility." *See, e.g., Mendoza Perez v. INS*, 902 F.2d 760, 763 (9th Cir. 1990) ("To qualify for political asylum, the alien must show that . . . persecution is a 'reasonable possibility.' "); *Ramirez Rivas v. INS*, 899 F.2d 864, 866 (9th Cir. 1990) ("To be objectively reasonable, there must be some reasonable possibility of persecution . . ., but persecution does not have to be more likely than not."); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987) ("[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985) ("The objective component is satisfied if persecution is, in fact, a 'reasonable possibility.' ").

To demonstrate a reasonable possibility of persecution under this circuit's law, an applicant must present " 'specific facts' through objective evidence to prove 'good reason' to fear future persecution." *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984)), *aff'd*, 480 U.S. 421 (1987). This evidentiary burden is met by presenting evidence that is either documentary in nature or, in its absence, testimony that is "credible, persuasive, and refers to '*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution.' " *Id.*; *see also De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990) ("The objective component requires a showing, by credible, direct and specific evidence in the record, of facts that would support a reasonable fear that the petitioner faces persecution."). Like the "reasonable possibility" standard, this evidentiary standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d at 574. While the "reasonable possibility" standard defines the risk of persecution that satisfies the objective component of well-founded fear, the "credible, direct and specific evidence" standard mandates the type of evidence that must be proffered to establish it.

We note that while the two-pronged formulation of the well-founded fear test, requiring both a subjective component (fear) and an objective component (a reasonability [sic] possibility of persecution), is the proper test to be applied in this circuit, other formulations of the well-founded fear test may not be inconsistent with this formulation. Thus, in *Canas Cuadras*

v. INS, 910 F.2d 567 (9th Cir. 1990), this circuit upheld the use of the "reasonable person" test set forth by the Fifth Circuit in *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987), as applied by the BIA in that case, because the BIA's analysis conformed with this circuit's formulation. First, the BIA determined that the applicant's fear was "subjectively genuine." 910 F.2d at 571. Second, it determined that there was an objectively "valid reason for the fear," and, thus, a reasonable possibility of persecution[5]. *Id.*

and adding a new footnote 5 (renumbering subsequent footnotes):

> [5] The "reasonable person" standard for asylum conceivably could fall prey to to [sic] the pitfall of failing to consider the circumstances of the applicant for asylum, in favor of considering whether an abstract person, divorced from this context, would experience fear of persecution. Application of that test in this manner would clearly be inconsistent with this circuit's formulation. However, the "reasonable person" standard need not be construed in this manner. As the Second Circuit explained in *Carcamo Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986):
>
> > [I]n evaluating a claim based on the fear that would strike a "reasonable person", the board should be sensitive to the position into which the person is, hypothetically, being placed. What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including, a loss of freedom or even, in some cases, the loss of life.
>
> Applied in this manner, the "reasonable person" test is consistent with this circuit's formulation of the well-founded fear test.

(2) Deleting the word, "presumption," at Slip op. 7731, line 4, and inserting "inference" in its stead.

OPINION

FLETCHER, Circuit Judge:

Elias Zacarias petitions for review of the denial of his application for political asylum and withholding of deportation. We grant his petition for review in respect to his claim to eligibility for asylum.

PRIOR PROCEEDINGS

Elias fled Guatemala in March of 1987. When he entered the United States in July of 1987, the respondent immigration and Naturalization Service ("INS" or "Service") apprehended him. He conceded deportability and applied for asylum and withholding of deportation. After a hearing on December 14, 1987 (the "December hearing") before an Immigration Judge ("IJ"), his application was denied. He appealed to the Board of Immigration Appeals ("BIA" or "Board"). The Board summarily dismissed his appeal on procedural grounds. He then moved for reconsideration. The Board denied the motion. He then moved for reopening of his asylum and withholding of deportation claims in light of new evidence; the Board denied that motion also, but excused the prior procedural lapse and gave the merits of his appeal plenary consideration. He now petitions this court for review of all three of the Board's adverse rulings. Because the Board cured whatever mistake it might have made in summarily dismissing

the first appeal, we do not review the denial of the motion to reconsider.[1] We treat the Board's denial of the motion to reopen as both an affirmance of the IJ's ruling after the initial hearing and as a denial of the motion to reopen.[2] We hold that the petitioner established eligibility for asylum at his initial hearing, but that the new evidence did not require the reopening of his withholding of deportation claim.

DISCUSSION

We review, in effect, two records in this case. The first is the record that the petitioner made before the IJ at the December hearing. The second is that record supplemented by a letter from the petitioner's father, which was submitted for the first time as an exhibit accompanying his September 28, 1988 petition to the Board to reopen the proceedings.

A. The December Hearing

At the December hearing, Elias testified that one evening in January of 1987, two uniformed guerrillas, carrying machine guns and wearing handkerchiefs

[1] In its November 18, 1988 opinion denying the motion to reopen, the Board, in addition to addressing the sufficiency of the new evidence as a basis for reopening, explained for the first time why it found that the petitioner was not entitled to relief based on the evidence he presented at his hearing before the IJ. The petitioner had been denied review on the merits by the Board of the IJ's decision because the petitioner's lawyer had submitted the brief late, owing to erroneous information given by a clerk of the Immigration Court. In its decision denying the motion to reopen, the Board said that it would "look beyond" the procedural mix-up and review the IJ's decision on the merits.

[2] The INS in its brief suggested that we treat the Board's rulings in this manner.

to conceal their faces, approached the house where he and his parents lived. They identified themselves as guerrillas, and attempted to persuade him to join their ranks. Elias refused to join, despite their insistence. They told him to "think it [over] well" and said that they would be back. The petitioner, afraid that the guerrillas would come back and "take him," fled Guatemala approximately two months later.[3] He was eighteen at the time.

The record before the IJ at the hearing included, in addition to Elias' testimony, an advisory letter from the State Department regarding Elias' application. The letter said in relevant part:

> The applicant alleges fear of persecution because of civil conflict that afflicts parts of Guatemala and has caused various hardships and dangers, including forced recruitment by opposing armed forces. . . . Persons who flee their homelands due to national armed conflicts in which they are random victims of violence, intimidation, or recruitment are not generally classifiable as refugees under U.S. law.
>
> *This opinion is based on our analysis of country conditions and other relevant factors*, plus an evaluation of the specific information provided in the application.

Administrative Record at 86 (emphasis added).

The petitioner, of course, does not agree with the State Department's ultimate legal conclusion, but he asserts that the first sentence in the quotation constitutes a recognition by the State Department that both sides in Guatemala's civil war engage in forced

[3] The IJ found Elias' testimony to be credible and the BIA did not disturb that finding.

recruitment. The INS argues that the sentence merely restates the petitioner's allegations.

We review the Board's factual findings under the "substantial evidence" standard and reverse if the BIA's findings are not substantially reasonable. *Artiga Turcios v. INS*, 829 F.2d 720, 723 (9th Cir. 1987).

Both the face of the letter and the other evidence in the record convince us that the Service's interpretation of the letter is not supported by substantial evidence. The emphasized portion of the letter explicitly says that the State Department independently analyzed country conditions. Moreover, the State Department, in saying that "opposing armed forces" engage in forced recruitment, could not have been merely restating the petitioner's allegations, because nothing in the portion of the petitioner's asylum application reviewed by the State Department alleged forced recruitment by either side in the civil war, let alone *both* sides. When read in the context of the record as a whole, the letter supports the petitioner's claim that the guerrillas engage in forced recruitment.[4]

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[4] The petitioner also calls our attention to another document written by the State Department, a report by the Department to both houses of Congress in February, 1990, saying, *inter alia*,

> [T]he Communist guerrillas increased their campaign of violence which included destruction of public and private property, robbery, *forced recruitment* and labor, and indiscriminate use of land mines.

Department of State, 101st Cong., 2d Sess., *Country Reports on Human Rights Practices for 1989* (Joint Comm. Print 1990) (emphasis added).

We do not use the Report to support our conclusion that the BIA misread the State Department's letter. The BIA's decision was rendered before the Report was issued.

We now consider whether Elias' encounter with the guerrillas, coupled with the fact that the guerrillas engage in forced recruitment, entitles him to eligibility for asylum or withholding of deportation.

To obtain withholding of deportation, a person must show that, if deported to his home country, it is more likely than not that his life or freedom would be threatened on account of race, religion, nationality, membership in particular social group, or political opinion. Immigration and Nationality Act (INA) § 243(h), 8 U.S.C. § 1253(h); *INS v. Stevic*, 467 U.S. 407 (1984). To establish eligibility for asylum, an applicant must show that he has a well-founded fear of persecution on account of at least one of those same five bases. INA § 208(a), 8 U.S.C. § 1158(a); INA § 101(a)(42)(a), 8 U.S.C. § 1101(a)(42)(A). A "well-founded fear" is a fear that is both genuine and objectively reasonable. To be objectively reasonable, there must be some reasonable possibility of persecution, but persecution does not have to be more likely than not. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987).

The "reasonable possibility" standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) ("Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution."). In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), the Supreme Court noted that the "reasonable possibility" standard was a "moderate interpretation" of Section 208(a)'s well-founded fear requirement. Subsequent Ninth Circuit case law has consistently expressed the risk of persecution that must be demonstrated in order to fulfill the objective requirement of well-founded

fear as a "reasonable possibility." *See, e.g., Mendoza Perez v. INS*, 902 F.2d 760, 763 (9th Cir. 1990) ("To qualify for political asylum, the alien must show that . . . persecution is a 'reasonable possibility.' "); *Ramirez Rivas v. INS*, 899 F.2d 864, 866 (9th Cir. 1990) ("To be objectively reasonable, there must be some reasonable possibility of persecution . . ., but persecution does not have to be more likely than not."); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987) ("[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985) ("The objective component is satisfied if persecution is, in fact, a 'reasonable possibility.' ").

To demonstrate a reasonable possibility of persecution under this circuit's law, an applicant must present " 'specific facts' through objective evidence to prove 'good reason' to fear future persecution." *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984)), *aff'd*, 480 U.S. 421 (1987). This evidentiary burden is met by presenting evidence that is either documentary in nature or, in its absence, testimony that is "credible, persuasive, and refers to '*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution.' " *Id.*; *see also De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990) ("The objective component requires a showing, by credible, direct and specific evidence in the record, of facts that would support a reasonable fear that the petitioner faces persecution."). Like the "reasonable possibility" standard, this evidentiary standard derives from the Seventh Circuit's test for determining well-founded fear enunciated in *Carvajal-Munoz v. INS*, 743 F.2d at 574. While the "reasonable possibility" standard defines the risk of persecution that satisfies the objective component of well-founded fear, the "credible, direct and specific evidence" standard mandates the type of evidence that must be proffered to establish it.

We note that while the two-pronged formulation of the well-founded fear test, requiring both a subjective component (fear) and an objective component (a reasonability [sic] possibility of persecution), is the proper test to be applied in this circuit, other formulations of the well-founded fear test may not be inconsistent with this formulation. Thus, in *Canas Cuadras v. INS*, 910 F.2d 567 (9th Cir. 1990), this circuit upheld the use of the "reasonable person" test set forth by the Fifth Circuit in *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1565 (1987), as applied by the BIA in that case, because the BIA's analysis conformed with this circuit's formulation. First, the BIA determined that the applicant's fear was "subjectively genuine." 910 F.2d at 571. Second, it determined that there was an objectively "valid reason for the fear," and, thus, a reasonable possibility of persecution[5]. *Id.*

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[5] The "reasonable person" standard for asylum conceivably could fall prey to the pitfall of failing to consider the circumstances of the applicant for asylum, in favor of considering whether an abstract person, divorced from this context, would experience fear of persecution. Application of that test in this manner would clearly be inconsistent with this circuit's formulation. However, the "reasonable person" standard need not be construed in this manner. As the Second

The persecution need not come from the government in order for the alien to obtain relief; it can come from an entity which the government is "unwilling or unable to control." *McMullen v. INS*, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981). Because nongovernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution.[6] *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988); *see also Artiga Turcios*, 829 F.2d at 723. The persecution is properly categorized as "on account of political opinion," because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political. *Arteaga*, 836 F.2d at 1232 n.8; *see also Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984) ("Because [alien] refused to join [guerrillas'] cause, the guerrillas are likely to consider him a political opponent").

Circuit explained in *Carcamo Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986):

> [I]n evaluating a claim based on the fear that would strike a "reasonable person", the board should be sensitive to the position into which the person is, hypothetically, being placed. What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is facing the possibility of persecution, perhaps including a loss of freedom or even, in some cases, the loss of life.

Applied in this manner, the "reasonable person" test is consistent with this circuit's formulation of the well-founded fear test.

[6] The State Department in its advisory letter failed to recognize this, hence its legal error.

An alien need not actually have suffered persecution in order to qualify for withholding of deportation or asylum. A threat of persecution can be enough. Indeed, with regard to withholding of deportation, the statute expressly speaks in terms of the *threat* to the alien's life or freedom. INA § 243(h). The threat can be an explicit verbal threat or a threat that is implicit from the circumstances. *Artiga Turcios*, 829 F.2d at 723. The key question is whether "there is reason to take the threat seriously." *Bolanos-Hernandez*, 767 F.2d at 1285. If it is "more likely than not" that the threat will be carried out, the petitioner is entitled to withholding of deportation. If there is a "reasonable possibility" that it will be carried out, the petitioner is eligible for asylum. In determining the likelihood that the alien will be persecuted, "we examine the guerrillas' will or ability to carry out the threat, not simply whether threats were made." *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988); *Arteaga*, 832 F.2d at 1232-33.

In *Rodriguez-Rivera*, the court faced a peculiar factual situation. The applicant, Rodriguez-Rivera, knew and worked with Salvador, the person chiefly responsible for the threats against him. 848 F.2d at 1000. Salvador died shortly after Rodriguez-Rivera fled the country. Salvador was a guerrilla, but, according to Rodriguez-Rivera's testimony, he threatened only that "'he' (Salvador) would kill Rodriguez-Rivera." *Id.* at 1006. Salvador did not state or imply that *the guerrillas* would kill Rodriguez-Rivera, that they had any interest in him, or that they even knew who he was or where he lived; Salvador stated only that *he* personally wanted to kill Rodriguez-Rivera. Thus, the BIA in that case reasonably could conclude that

when Salvador died, the threat he personally presented died with him. Indeed, the court stated that "the fact that Salvador is now dead is the most significant factor supporting the BIA's determination." *Id.* Obviously, the testimony countering the ordinary inference that Salvador, as a guerrilla, was threatening Rodriguez-Rivera in order to carry out the goals of the guerrillas (as opposed to his own personal goals) was crucial to the outcome of that case. If the guerrillas had been aware of Rodriguez-Rivera's availability as a potential recruit, they could easily have assigned someone other than Salvador to do the dirty work, and the threat would have continued to be serious.

With regard to the two men who accompanied Salvador when he made a second threat against Rodriguez-Rivera, there was absolutely no evidence in the record suggesting that those men knew who Rodriguez-Rivera was or where he lived. In light of the statements made by Salvador while he and the two men were threatening Rodriguez-Rivera, it was not unreasonable to infer that the men's only interest in Rodriguez-Rivera was to assist Salvador in his personal vendetta. Neither the men's words, their conduct, nor the circumstances surrounding their encounter with Rodriguez-Rivera suggested that the guerrillas as a group had an interest in killing, kidnapping, or otherwise persecuting Rodriguez-Rivera. The BIA could thus reasonably conclude[7] that when Salvador died, the two men did not have the *ability*

[7] The asylum applicant in *Rodriguez-Rivera* did not mention in his application the two most significant threats that he testified to in his hearing. *Rodriguez-Rivera*, 848 F.2d at 1000. That cast some doubt on his credibility and affected the court's review.

to persecute Rodriguez-Rivera, because they did not know who he was or where he lived, and that they did not have the *will* to persecute him, because their only reason to bother him was to assist Salvador, who had died.

In *Arteaga*, the alien was confronted at his house by a group of guerrillas who tried to induce him to join their cause. After he refused, they said to him: "Even if you don't come, we'll get you." *Arteaga*, 836 F.2d at 1228. In *Arteaga*, unlike in *Rodriguez-Rivera*, there was no evidence contradicting the common sense inference that the threat was from the guerrillas as a group and not just from the particular individuals assembled at his house.

The court stated in *Arteaga* that "a specific verbal threat by the guerrillas directed at an individual whose identity and residence are known to the guerrillas is sufficient to create a well-founded fear." 836 F.2d at 1233. In *Rodriguez-Rivera*, 848 F.2d at 1006, the court observed that this statement in *Arteaga* had to be qualified by the holding in *Bolanos-Hernandez*, 767 F.2d at 1285-86, that the group making the threat had to have the "will or ability" to carry it out. This observation was unremarkable because the *Arteaga* court itself qualified the statement in the same way. *Arteaga*, 836 F.2d at 1232 (citing *Bolanos-Hernandez*).

After making its observation, the *Rodriguez-Rivera* court then said that "the entire discussion of the eligibility for asylum in *Arteaga* was dicta[.]" *Rodriguez-Rivera*, 848 F.2d at 1006. The *Rodriguez-Rivera* court did not say that *Arteaga*'s analysis of asylum was *incorrect*. To the extent that *Rodriguez-Rivera* implied *Arteaga* was incorrect, that implication would itself be dicta, for nothing in *Rodriguez-*

Rivera's holding was inconsistent with *Arteaga*'s discussion of eligibility for asylum. In any event, the reasoning in the two cases can be reconciled; both *Arteaga* and *Rodriguez-Rivera* followed *Bolanos-Hernandez*.

Rodriguez-Rivera, *Arteaga*, and *Bolanos-Hernandez* together stand for the proposition that when a member of a group which engages in violence makes a threat, and there is no evidence that the member has only personal motives for making the threat, the reasonable inference is that the *group* is responsible for the threat and that the will or ability of the *group* should be examined to determine if it is reasonable to take the threat seriously.

Examining the facts in light of these authorities, we conclude that Elias established eligibility for asylum at the December hearing but that he did not establish entitlement to withholding of deportation. There is no dispute that Elias' fear of persecution was genuine and that he thus satisfied the subjective test for eligibility for asylum. He testified credibly that he feared the guerrillas would return and "take" him against his will. The dispute is over whether he satisfied the objective test and showed there was a reasonable possibility that the guerrillas would forcibly recruit him.

The Board's crucial error was its conclusion that the Guatemalan guerrillas do not engage in forced recruitment. For the reasons stated above, the State Department letter was proof that the guerrillas do engage in forced recruitment. The Board's error colored its analysis of the circumstances surrounding the guerrillas' encounter with Elias. After the guerrillas failed in their attempt to persuade Elias to join voluntarily, they told him to "think it [over] well"

and that they would be back. Because the Board believed that the guerrillas did not engage in forced recruitment, it did not think it reasonable for Elias to interpret the guerrillas' statements to constitute a threat of persecution. But in light of the guerrillas' practice of using force to recruit people, it certainly was reasonable for a person in Elias' situation to take the statements as threats. *See Artiga Turcios*, 829 F.2d at 723-24 (focus is on whether it was reasonable for the alien to perceive the circumstances as threatening). Moreover, the men who attempted to recruit him carried machine guns and wore masks, lending further credence to Elias' belief that he was being threatened.[8]

We now consider whether the guerrillas had the will and ability to persecute Elias. The fact that the guerrillas engaged in forced recruitment is proof that they had the will to persecute Elias. That Elias was not harmed in the two-month period during which he was preparing to leave the country is relevant, but as we said in *Rivas v. INS*, No. 88-7433, slip op. 3157, 3173-74 (9th Cir. March 29, 1990), the fact that some time passed without harm has only marginal probative value. *Rivas* and the cases it

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[8] The BIA thought it significant that the guerrillas did not actually point the weapons at Elias. Has they done that, we might have a case of actual persecution rather than a case of threatened persecution. *Cf. Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ("evidence of past persecution or a threat of future persecution" can establish well-founded fear).

At oral argument the lawyer for the INS indulged in the wholly unwarranted speculation that the guerrillas wore handkerchiefs not to conceal their faces but "because it might have been dusty that day."

cited as support for that proposition found that the alien had established a clear probability of persecution despite short periods without harm. In addition to having the will to persecute Elias, the guerrillas had the ability to persecute him because they knew where he lived and who he was.

Finally, the threat to Elias was for political as opposed to personal reasons; the Board did not suggest that the individual guerrillas who appeared at his door had a personal quarrel with Elias, and in any event, there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting Elias to further the *group*'s political goals. There was thus a reasonable possibility, based on the evidence presented at the December hearing, that the guerrillas would return and take Elias by force, thereby persecuting him on account of political opinion. The Board's conclusion that Elias was ineligible for asylum was not substantially reasonable. *See Artiga Turcios.*

The Board, however, was substantially reasonable in concluding that Elias failed to prove the "clear probability" of persecution necessary to obtain withholding of deportation. Elias did not present evidence suggesting that forced recruitment by the Guatemalan guerrillas occurred with such frequency that it would be more likely than not that Elias would be forcibly recruited.[9] Nor did he present evidence

[9] In many of our cases concerning threats by the Salvadoran guerrillas, this issue apparently was not even in dispute, perhaps because the practices of the Salvadoran guerrillas are well-documented. *See e.g., Artiga Turcios; Maldonado-Cruz,* 883 F.2d at 791-92 ("Maldonado 'is likely to be persecuted by a politically motivated group that frequently engages in terrorist tactics directed at those who refuse to join its armed political struggle.' ") (quoting *Bolanos-Hernandez,* 767 F.2d at 1287).

that members of his family or other persons whom he knew were the victims of forced recruitment. *Cf. Bolanos-Hernandez,* 767 F.2d at 1280 (petitioner's friends had been killed after receiving threats by Salvadoran guerrillas; entitlement to withholding of deportation established). Either kind of evidence would have strengthened his case. Nonetheless, the fact that the Guatemalan guerrillas use forced recruitment with sufficient frequency for the State Department to have taken notice and that they had once approached Elias masked and armed and had promised to return, demonstrates that there was a reasonable possibility that the guerrillas would return and take Elias.[10]

B. The Motion to Reopen

About ten months after the December Hearing, Elias' father wrote him a letter saying that guerrillas had returned to the house two times after Elias had fled (and after the time of the hearing) and that they had asked for Elias and his father both times. The first time, only Elias' mother was home; she told them her son and her husband were out, and she refused to be more specific. They left. The second time, three months later, Elias' father was home. They attempted to recruit the father, but according to the letter, they were more interested in Elias, since the father was 60 years old. He told them that Elias had fled to the United States.

Elias, in his motion to reopen, argued to the Board that this new evidence in conjunction with the evi-

[10] We do not imply that information regarding conditions and practices in a country must come from a government agency such as the State Department. Evidence from other sources also can be highly probative.

dence presented at the December Hearing established a prima facie case of entitlement to withholding of deportation and of eligibility for asylum. Since we have held that Elias established his eligibility for asylum without the additional evidence, we consider only whether a prima facie case has been established for withholding of deportation.

As a threshold matter, we address the standard of review for petitions to review motions to reopen.

In *INS v. Abudu*, 108 S.Ct. at 911-12, the Supreme Court noted that the BIA can deny a motion to reopen on any of three independent grounds:

> First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. *The standard of review of such a denial is not before us today*[.] Second the BIA may hold that the movant has not introduced previously unavailable, material evidence, 8 CFR § 3.2 (1987), or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum [11] initially, 8 CFR § 208.11 (1987). . . . We decide today that the appropriate standard of review of such denials is abuse of discretion. Third, in cases in which the ultimate grant of relief is discretionary (asylum . . . but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to

[11] The Board treats asylum aplications also as applications for withholding of deportation, 8 C.F.R. § 208.3(b) (1987), so this ground applies to withholding claims as well.

> the discretionary grant of relief. We have consistently held that denials on this third ground are subject to an abuse-of-discretion standard.

(Emphasis added). In *INS v. Abudu*, the Supreme Court reversed our decision in *Abudu v. INS* because we read the BIA's opinion in that case to constitute a denial only on the first ground, when in fact the BIA also denied the alien's claim on the second ground, because he did not adequately explain why he had failed to apply for asylum at his initial hearing.

The Supreme Court made it clear throughout its opinion that it was addressing only the standard of review for denials of motions to reopen based on questions such as: whether the evidence was available at the time of the original deportation hearing; if it was available, whether the moving party had a reasonable excuse for failing to adduce it; if it was not available, whether there was other significant evidence at the time of the hearing such that the moving party should have pressed claims based on that evidence and not delayed. These questions all help to ferret out cases where parties present new evidence principally for the purpose of causing delay. The Supreme Court in *INS v. Abudu*, 108 S.Ct. at 914, reasoned that any tribunal, administrative or otherwise, ought to have broad discretion to deter such abuses.

That reasoning does not apply with the same force when the tribunal has found that the movant's failure to adduce the evidence was most likely not attributable to a desire for delay and when the tribunal has chosen to address the merits. Indeed, when the substantive issue being litigated is the probability of *future* events occurring, as it frequently is in asylum

and withholding cases, there are particularly compelling reasons for allowing the merits of the alien's claim to be given a hearing in light of evidence of new developments. Those new developments can substitute for the speculation on which the initial judgment was based.

In any event, the Supreme Court explicitly stated in *INS v. Abudu* that it was not addressing the standard of review for denials of motions to reopen based on the failure to establish a prima facie case. Our discussion in *Abudu v. INS* of the appropriate standard of review for denials of reopening based on the alien's failure to make a prima facie case of eligibility for asylum [12] or withholding of deportation therefore still stands.

In *Abudu v. INS*, we held that the standard of review is "abuse of discretion." 802 F.2d at 1100. More specifically, we held that "the Board must accept the factual statements in the alien's affidavits as true," *id.* at 1101, and that the Board abuses its discretion if it fails to find a prima facie case established when the evidence in the affidavits satisfies the requirements for eligibility for substantial relief. *Id.* at 1100. We had so held in a number of previous cases. In *Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir. 1986), for example, we held that "[t]he Board must accept the factual statements in the alien's affidavits as true unless they are inherently unbelievable" and that "[t]he Board has no discretion if the alien proves his [prima facie] claim." In

[12] The determination of whether an alien is *eligible* for asylum as a "refugee" within the meaning of INA § 102(a)(42)(A), as opposed to whether he is entitled to the ultimate *grant* of asylum, is not within the BIA's discretion. *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 518 (9th Cir. 1985).

Sakhavat v. INS, 796 F.2d 1201 (9th Cir. 1986), we held that "the BIA abused its discretion when it disbelieved affidavit evidence that was not inherently incredible," and found that the BIA erred "by either ignoring or prematurely discrediting key elements of Sakhavat's prima facie case." *Id.* at 1204-05 (citations and internal quotations omitted); *see also Ghadessi v. INS*, 797 F.2d 804, 806-07 (9th Cir. 1986) (faulting Board for its "weighing of the quality, rather than the sufficiency" of evidence in a motion to reopen). In *Abudu v. INS*, 802 F.2d at 1101, we extended the reasoning of these cases and held that on a motion to reopen, the Board "must draw reasonable inferences from the facts [pertaining to the merits of the prima facie case] in favor of" the moving party. The evidence in *Abudu v. INS* came exclusively from affidavits. In a case where some of the evidence is developed at a hearing, the BIA is of course free to interpret that evidence free from inferences in favor of the moving party. The BIA's conclusions derived from that evidence will be accepted by the reviewing court if it is supported by substantial evidence. *See Artiga Turcios*, 829 F.2d at 723.

In the case under consideration, the Board denied the motion to reopen because of Elias' failure to furnish sufficient additional evidence, when taken together with the evidence adduced at the hearing before the IJ to make out a prima facie case, the first ground identified by the Court in *INS v. Abudu*.[13]

[13] The INS seems to suggest in one cryptic sentence in its brief that the BIA denied the motion to reopen not only because the new evidence, combined with the old, did not establish a prima facie case, but because the new evidence was not "material" within the meaning of 8 C.F.R. § 3.2. The Board mentioned the materiality requirement, but to the

We therefore apply the standard of review from our decision in *Abudu v. INS*.

The BIA accepted the father's letter as true, but it denied the claim of eligibility for asylum (and *a fortiori* the claim for withholding of deportation) because it believed there was no new evidence that the guerrillas engaged in forced recruitment. We disagreed with the Board's assessment of the initial evidence, because, as we stated above, it was error to find that the guerrillas do not engage in forced recruitment; however, we agree with the Board's assessment of the evidence on the motion to reopen. The petitioner's new evidence may have strengthened

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extent the Board applied it, it did so in such a way as to equate "material evidence" with evidence sufficient to make out a prima facie case. The Supreme Court in *INS v. Abudu* stated that the BIA has broad discretion to deny motions based on new evidence that is not material, 108 S.Ct. at 909 n.3. To read "material" the way the Board apparently did in this case would be to render meaningless the Supreme Court's careful distinction in *INS v. Abudu* between denials based on materiality and denials based on failure to establish a prima facie case. By "material" evidence, the Supreme Court could only have meant evidence tending to strengthen the alien's claim for relief, not evidence so probative that it would establish a prima facie case for relief.

The Board's confusion is evidenced by the fact that it based its definition of materiality on a misquotation from the Supreme Court's decision in *INS v. Abudu*. The BIA quoted *INS v. Abudu* to say at page 914: " 'Material evidence,' in the context of a motion to reopen, is evidence the facts of which 'are of such a nature that they will probably change the results if [a new hearing is held].' " We cannot find the words quoted or anything resembling them at the page cited, or indeed anywhere in the Supreme Court's opinion. Wherever this quotation comes from, it sounds more like the definition of new evidence sufficient to make a prima facie case on reopening than it does the definition of "material."

his claim to eligibility for asylum [14] but it did not cure the key deficiency in his withholding of deportation claim. To show that forced recruitment was more than a reasonable possibility, Elias needed to present more specific evidence concerning the extent of forced recruitment by the guerrillas, either in the country at large or as it affected him, members of his family or other people whom he knew. *Cf. Bolanos-Hernandez*, 767 F.2d at 1280.

CONCLUSION

Elias established his eligibility for asylum; he did not establish his entitlement to withholding of deportation. To that extent, the petition for review is granted. We remand to the Board to exercise its discretion with respect to the petitioner's asylum application.

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[14] The *only* reason given by the Immigration Judge for denying Elias' asylum application at the December hearing was that Elias did not present evidence that the guerrillas had returned before he fled. That they apparently did return illustrates why we generally do not think it is reasonable for the Board to accord significant weight to short periods where no incidents occur.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7507

INS No. A27-926-183

JAIRO JONATHAN ELIAS ZACARIAS, PETITIONER

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

ORDER

[Filed Jan. 10, 1991]

Before: FLETCHER, PREGERSON and NELSON,
Circuit Judges

Except to the extent reflected in the amended opinion filed December 19, 1990, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF
IMMIGRATION REVIEW

File: A27 926 183—Phoenix Date: Nov. 18, 1988

In re: JAIRO JONATHAN *ELIAS*-ZACARIAS

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:

Susan Giersbach-Rascon, Esquire
Arizona Center for Immigration
214 East Willetta
Phoenix, Arizona 35004

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Reopening

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. The respondent, through counsel, has filed a Motion to Reopen requesting this Board to reopen his deportation hearing in order to allow new evidence to be submitted in support of this appeal. The motion will be denied.

On July 15, 1988, the Board summarily dismissed the respondent's appeal, pursuant to 8 C.F.R. § 3.1 (d)(1-a)(i), for filing a Notice of Appeal (Form

I-290A) based only on generalized statements that failed to adequately specify the reasons for the appeal. However, the Board granted the respondent an additional 30 days in which to voluntarily depart the United States. The Board subsequently received from the respondent a Motion to Reconsider our decision. On September 12, 1988, we denied this motion on the grounds that respondent's motion was actually a Motion to Reopen, and that no new evidence or affidavits supporting this motion had been submitted pursuant to the requirements of 8 C.F.R. §§ 3.2 and 103.5. On September 28, 1988, the Board received from the respondent a Motion to Reopen. Attached to the motion is a letter from the respondent's father, received by the respondent, in early August 1988, an affidavit by counsel attesting to the fact that she had an informal agreement with the clerk of the immigration court resetting the respondent's due date for filing an appellate brief or statement in support of the appeal, and an affidavit from another attorney in counsel's office also attesting to this informal arrangement with the immigration court.

First, concerning the belatedness of the respondent's supporting brief on appeal, the Board once again reiterates that the Board may only act on evidence submitted in the record. Even though counsel has submitted two affidavits in support of her contention that the only reason a brief wasn't timely filed in this case was due to a misunderstanding with the immigration court clerk, the form of these assertions are not important. As the respondent is a licensed attorney and an officer of the court, we do not doubt the validity of her statements. In our previous decision, we looked beyond this issue and

dismissed the respondent's motion based on his failure to meet the statutory requirements in support of that motion. In this case, we will do the same. However, it is obvious that "informal" arrangements between the immigration court and aliens or their counsel, have the potential for creating unforeseen problems, particularly when these arrangements conflict with the evidence of record. Such is the case now before us. Had counsel submitted a separate brief or statement in accordance with the attached briefing schedule, then last minute motions, which require a heavy burden on which to prevail, would be unnecessary. With that said, we will turn now to the merits of the respondent's Motion to Reopen.

Federal regulations at 8 C.F.R. §§ 3.2 and 103.5 mandate that a motion to reopen shall not be granted unless the evidence was not available and could not have been discovered or presented at the former hearing, and that it shall be supported by affidavits or other evidentiary material. *See, e.g., INS* v. *Wang*, 450 U.S. 139, 141 (1981); *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976). Further, the new facts alleged must be sufficient, if proved, to change the result of the previous decision. That is, a *prima facie* showing must be made that shows statutory eligibility and that the respondent warrants the relief as a matter of discretion. *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979). The decision to grant or deny a motion to reopen is within the sound discretion of the Board. 8 C.F.R. § 3.8; *Matter of Barocio*, Interim Decision 2992 (BIA 1985).

Most recently, in *INS* v. *Abudu*, —— U.S. ——, 108 S. Ct. 904 (1988), the Supreme Court addressed the issue of the standard of review that must be applied to such motions in order to file an application

for asylum for the first time. The Court opined that motions to reopen in the administrative context are analogous to motions for a new trial in a criminal case on the basis of newly discovered evidence, and where the moving party bears a heavy burden before prevailing. In both contexts, the Court stated that there is a strong public interest in bringing litigation to a close as promptly as is consistent with a fair hearing and adjudication of facts, and that all ambiguities in the factual averments must be resolved in a movant's favor. The Court went on to recognize the special administrative, judicial, and sometimes political, considerations in the immigration law context, and where giving deference to decisions on petitions for reopening or reconsideration apply with even greater force. *Abudu* at 914-15.

Even if we take as true the supporting documents in respondent's motion, we nonetheless find that he has failed to sustain his heavy burden in this motion. Whether addressed in terms of "material" evidence [1] as required by 8 C.F.R. § 3.2, or a "prima facie" showing of eligibility, the respondent's factual basis will not support reopening these proceedings.

Both in his written application for asylum (Form I-589), and his testimony at trial, the respondent stated that he fled his native country of Guatemala approximately 2 months after a small group of guerrillas visited his home one night in January 1987,

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[1] "Material evidence," in the context of a motion to reopen, is evidence the facts of which "are of such a nature that they will probably change the results if [a new hearing is held]." It is evidence "which, by itself or in conjunction with other evidence of record, is determinative of an issue." *Abudu, supra* at 914, *citing Taylor* v. *Illinois*, 484 U.S. ——, —— n.18, 108 S. Ct. 646, 655, n.18, 98 L. Ed. 2d 798 (1988) (citing cases).

where they attempted to persuade him to join them. When the respondent refused, the guerrillas left the respondent unharmed, but told him to think it over and that they would return at a later date. Based on this evidence, the immigration judge at respondent's deportation hearing found that since the guerrillas never returned, and the respondent's family never subsequently had any problems from the guerrillas, the respondent had failed to show that the guerrillas would seek him out upon his return.

In his Motion to Reopen, the respondent attached a recently received letter from his father indicating that the guerrillas twice returned to the home where the respondent had lived with his parents, searching for the respondent. This, argues the respondent, clearly shows that the immigration judge was incorrect in finding that the guerrillas would not keep searching for him, and corroborates the respondent's assertion that he has a well-founded fear of persecution by the guerrillas who would impute to him a political opinion for his refusal to serve with them. Indeed, the letter from respondent's father indicates that the guerrillas visited their home in January of 1988, and asked for him (the father) and his wife, but left when they discovered he was not at home. The second visit occurred in April 1988, when the guerrillas asked for the respondent, but was told that he was in the United States. Again, these visits were for the purpose of attempting to recruit the respondent, as counsel alleges in her motion.

Based on this evidence, we find that the respondent not only has failed to sustain his burden for reopening, as stated above, but also has failed to produce evidence that would establish a well-founded fear of persecution under the Act. Although the respondent has cited certain Ninth Circuit decisions

in support of his contention that he would be persecuted upon his return, we do not find these applicable to respondent's claim. Even though the respondent alleges that he was threatened by the guerrillas, the evidence of record does not bear this out. In fact, when the guerrillas left, they told the respondent that they would return. However, there was no threat made to the respondent that he would be harmed if he refused to join them. Further, the respondent admitted that he did not join the guerrillas because he would be sought after by the government, and also because the guerrillas often killed those who joined them and then deserted. Since the respondent refused to join the guerrillas, any fear he may have of being harmed by them is only speculative, particularly where no evidence has been submitted to show that the guerrillas harm those who refuse their invitation to join them, and that this harm would amount to persecution rather than retribution.

Moreover, in our decisions in *Matter of Vigil*, Interim Decision 3050 (BIA 1988), and *Matter of Maldonado*, Interim Decision 3041 (BIA 1988), we opined that when a guerrilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them, and according to respondent's father, even offered to pay the respondent for his services. In respondent's brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in their attempt to violently overthrow the Guatemalan Government. It can hardly be said that the guerrillas, in any of their visits, sought to harm

the respondent for having opinions they found offensive. Finally, we do not find the facts of this case to be controlled by the recent Ninth Circuit decision in *Arteaga* v. *INS*, 836 F.2d 1227 (9th Cir. 1988), where the alien there was actually threatened by the guerrillas for his refusal to join them. In the case now before us, the respondent has not shown that any threats were directed towards him by the guerrillas, only that he was approached by them and asked to join. In any event, the subsequent Ninth Circuit decision in *Rodriguez-Rivera* v. *INS*, —— F.2d ——, No. 87-7140 (9th Cir. 1988), indicates that the entire discussion in *Arteaga* regarding asylum eligibility, was *dicta*.

Accordingly, as we find that the respondent has failed to show, by his new evidence, a *prima facie* eligibility for asylum or that the results of respondent's deportation hearing would be changed due to the information contained in the letter, we must deny the respondent's Motion to Reopen. Accordingly, the Motion to Reopen is denied.

/s/ Mary Maguire Dunne
For the Board

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

File: A27 926 183—Phoenix Date: Sep. 12, 1988

In re: JAIRO JONATHAN *ELIAS*-ZACARIAS

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Susan Giersbach-Rascon, Esquire
214 East Willetta
Phoenix, Arizona 85025

ON BEHALF OF SERVICE:

Linda Boone
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Reconsideration

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. The respondent, through his counsel, has filed a Motion to Reconsider requesting this Board to reconsider the prior decision, and to allow him to file a brief in support of his appeal. The motion will be denied.

In a July 15, 1988, decision, the Board summarily dismissed the respondent's appeal for filing a Notice of Appeal (Form I-290A) based on only generalized statements that failed to adequately specify the reasons for the appeal, pursuant to 8 C.F.R. § 3.1(d)(1-a)(i). We also noted there that, although counsel had indicated on the appeal form that she would be filing a separate brief or statement, no brief or statement was provided within the briefing schedule after she received a verbatim transcript of the proceedings.

In a Motion to Reconsider, counsel for the respondent alleges that she had an oral understanding with a clerk of the immigration court that a new briefing schedule would be reset. Relying upon this oral representation, counsel avers that she did not file a brief or statement as she was waiting for the new briefing schedule to be forwarded to her.

Even though counsel has termed this a Motion to Reconsider, we believe, based on the circumstances, that this should more appropriately be a Motion to Reopen. In any event, we see no adequate basis upon which to grant the respondent's motion. First, there has been submitted no new evidence or affidavits supporting this motion, as required by 8 C.F.R. §§ 3.2 and 103.5. Second, as far as the record is concerned, counsel was granted until May 26, 1988, to submit an additional brief or statement in support of the Notice of Appeal, but failed to do so. Although counsel indicated that it is a common practice between the immigration court clerk and counsel's office to "informally" reset briefing schedules, the Board is bound by the evidence contained in the record, and must act solely thereon. Third, although counsel asserts that the respondent's appeal is meritorious,

counsel has not provided any evidence to corroborate such an assertion.

In short, we do not find that the reasons put forth by counsel warrants reopening these proceedings, particularly where there has been no evidentiary showing by the respondent that would warrant the relief originally requested, or that the decision of the immigration judge would be reversed. *See generally Matter of Haim*, Interim Decision 3060 (BIA 1988); *Matter of Rodriguez-Vera*, 17 I&N Dec. 105 (BIA 1979). Accordingly, the motion is denied.

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

File: A27 926 183—Phoenix Date: Jul. 15, 1988

In re: JAIRO JONATHAN *ELIAS*-ZACARIAS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Susan Giersbach-Rascon, Esquire
214 East Willetta
Phoenix, Arizona 85025

ON BEHALF OF SERVICE:

Linda Boone
General Attorney

CHARGE:

Order: Sec 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Asylum, withholding of deportation

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. The appeal is summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(i). The request for oral argument before the Board is denied. The respondent has in no meaningful way identified the basis of the appeal from the decision of the immigra-

tion judge. Respondent's counsel indicated on the Notice of Appeal (Form I-290A) dated December 4, 1987, that he would be filing a separate written brief or statement in support of his allegations of error after reviewing the transcript of the deportation hearing. We note that on May 10, 1988, a copy of the transcript was furnished to counsel, but that no brief or statement was filed within the time provided, and no explanation for this failure has been proffered. Such generalized statements as contained in the Notice of Appeal, without more, utterly fail to enlighten the Board as to the reasons, if any, for the appeal. *Martinez-Zelaya* v. *INS*, 841 F.2d 294 (9th Cir. 1988); *Matter of Lodge*, Interim Decision 3039 (BIA 1987); *Matter of Valencia*, Interim Decision 3006 (BIA 1986). Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director, and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Phoenix, Arizona

File No.: A 27 926 183

In the Matter of:

JAIRO JONATON ELIAS-ZACARIAS, RESPONDENT

December 4, 1987

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(2)—entered without inspection.

APPLICATION: Political Asylum, withholding of deportation, and in the alternative, voluntary departure.

ON BEHALF OF RESPONDENT:
Juan Rascon
Central American Refugee Project
6802 S. 24th Street
Phoenix, Arizona 85040

ON BEHALF OF SERVICE:
Linda Boone
Trial Attorney
230 N. First Avenue
Phoenix, Arizona 85025

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 19 year old single, male alien, a native and citizen of Guatemala who admitted the allegations on the Order to Show Cause and conceded the charge of deportability that he had entered the United States on or about July 12th 1987 without being inspected by a United States immigration officer. Deportability has been established and is not an issue. Guatemala was directed as the country of deportation. The respondent applied for political asylum, withholding of deportation, and in the alternative, voluntary departure. The application for political asylum is Exhibit 2 in the file, the State Department letter is Exhibit 3, documentary evidence submitted on behalf of the respondent is Exhibit 4, a certified copy of the I-213 is Exhibit 5 and some newspaper articles submitted by the Service are Exhibit 6.

The respondent testified that at some time around the end of January in 1987, two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there. He testified that the guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them.

The respondent testified that he did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. The respondent testified that he left Guatemala at the end of March which was approximately two months after his family was

visited by the guerrillas. The respondent testified that he left Guatemala because he was afraid that the guerrillas would return. Respondent's parents still reside in Guatemala and apparently the guerrillas have not returned to their home. Respondent does have four brothers ranging in ages from 22 to approximately 33, however, they do not live at home with the parents.

During the two month period that the respondent remained in Guatemala he still resided at his home and he still went to work. He testified that he left Guatemala after talking it over with his parents. It appears that basically the respondent claims that he is afraid to return to Guatemala based on this one attempted recruitment by the guerrillas. There does not appear to be any evidence that this attempted recruitment by the guerrillas is any different than that experienced by other Guatemalans. The respondent has a cousin in the United States and has indicated that his cousin may be able to help him to obtain the funds to return to Guatemala. The Service submitted an I-123 to indicate that the respondent had stated that one of the reasons he came to the United States was for economic reasons. In view of the holding in *Garcia-Ramos* which indicates that one of the reasons an alien comes to the United States is for economic reasons that in and of itself would not prevent him from obtaining political asylum if he can establish persecution based on one of the other grounds provided for in the statute. It should be noted that at this time the respondent has been found to have been a credible witness.

Considering all the evidence, it does not appear that the respondent has established that he is a refugee within the meaning of 101(a)(42) of The Act. Re-

spondent has failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. He also has failed to show a clear probability of persecution for one of the aforementioned five grounds. Since his parents have not apparently had a return visit or any problems from the guerrillas the respondent has failed to show that if he is returned to Guatemala the guerrillas will seek him out. Accordingly, the respondent will be denied relief for either asylum or withholding of deportation.

Respondent has requested that he be granted the privilege to voluntary [sic] depart, and he does believe he can obtain funds to leave the country voluntarily. It appears that the respondent does not have any criminal record and there does not seem to be any bar to his leaving voluntarily should he have the funds necessary to pay his way out of the United States. The respondent will be granted this privilege.

ORDER

IT IS HEREBY ORDERED that the respondent's application for political asylum and/or withholding of deportation be and the same are hereby denied.

IT IS FURTHER ORDERED that the respondent be granted the privilege to voluntarily depart the United States by December 11, 1987 or any extension thereof as may be granted by the District Director.

/s/ Irene Weiss
IRENE WEISS
Immigration Judge

APPENDIX G

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, as-

sisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208(a) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158(a), provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title.

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